

A **HONG LEONG BANK BHD**

v.
M MUTHIAH & ANOR AND ANOTHER APPEAL

B FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
RAUS SHARIF PCA
ABDULL HAMID EMBONG FCJ
AHMAD MAAROP FCJ
C ZALEHA ZAHARI FCJ
[CIVIL APPEALS NO: 02-8-03-2013(W) & 02-9-03-2013(W)]
7 NOVEMBER 2013

BANKING: Banks and banking business - Guarantees - Banking facilities - Borrower's default in repayment - Liability against guarantors - Notice of demand - Purpose of - Whether must state precise amount due and owing by guarantors - Guarantee agreement - Interpretation of - Whether guarantors deemed to be principal debtors - Certificate of indebtedness - Whether binding and sufficient proof of amount due - Whether liabilities of guarantors include interest arising from loan plus other charges - Whether guarantors liable for whole sum due and owing by borrower

F There were two appeals herein which arose out of the same suit and with the agreement of the parties, were heard together. The appellant ('plaintiff'), a bank, had granted three banking facilities to Sri Tanjung Travel Sdn Bhd ('the borrower') upon terms as contained in two separate letters of offer. The facilities comprised of a bank guarantee of RM100,000, a term loan of RM565,000 and an overdraft of RM3 million. The respondents ('defendants') stood as guarantors for the facilities granted, but only to the limit of RM5,665,000. Problems arose when the borrower defaulted in repayment of the banking facilities. As a result, the plaintiff commenced a suit in the High Court against all the parties involved and claimed for, *inter alia*, (i) RM8,834,348.11 for the overdraft facility as at 31 January 2006 (with interest); and (ii) RM207,752.01 for the term loan facility as at 31 January 2006 (with interest). Since the borrower was wound-up pursuant to a petition filed by a third party, the trial proceeded against the second to the fourth defendants as guarantors. It was the

defendants' contention (a) that their liability was limited to the sum of RM5,665,000 based on the proviso to cl. 1 of the guarantees; and (b) that the notice of demand was defective and invalid since the demand was for RM9,059,767.17. The High Court decided in favour of the plaintiff and held that the cause of action accrued against the defendants for failure to pay upon demand since there was a valid or real demand for the payment made. Further, it was held that the certificate of indebtedness was binding and sufficient proof of the amount due. On appeal, the Court of Appeal reversed the decision of the High Court and held that although it may not be necessary to state the actual amount in the demand addressed to the principal debtor, *ie*, the borrower, the same did not apply to a demand against a guarantor wherein the creditor was required to specify the exact amount. On that premise, it was decided that the notice of demand was bad in law. The Court of Appeal also decided that the certificate of indebtedness was not binding on the guarantors since their liabilities were governed by the maximum liability proviso in cl. 1 of the guarantees. Dissatisfied, the plaintiff appealed to this court. Leave to appeal was granted based on the following questions: (i) where a guarantee is made payable "on demand", whether a notice of demand issued to a surety must state the precise amount due and owed by the surety to the creditor ('first question'); and (ii) in the event the answer to the first question is in the negative, whether the precise amount due and payable by a surety can be subsequently adjudicated upon in court proceedings and the surety be made liable to pay the amount adjudicated to be due and owed under the guarantee ('second question').

Held (allowing appeal with costs; setting aside decision of Court of Appeal)

Per Arifin Zakaria CJ delivering the judgment of the court:

- (1) The guarantee in this case was an on demand guarantee. As such, there is a stringent requirement that the demand must be issued notifying the debtor that the creditor is demanding repayment of the debt. The purpose of the demand is to give notice to the debtor that the creditor is demanding repayment of the sum borrowed. Contrary to the finding of the Court of Appeal, it was not mandatory for the notice of demand to

- A state the exact amount due and payable to the creditor. In *Shell Marketing Co of Borneo Ltd v. Wee Boon Ping*, the judge was not prevented from giving summary judgment for the plaintiff even though the amounts stated in the letters of demand were more than the amount finally claimed.
- B Accordingly, the first question was answered in the negative (*Co-operative Central Bank Ltd (In Receivership) v. Meng Kuang Properties Bhd*; dist). (paras 25, 26, 28 & 29)
- (2) The approach to be adopted in interpreting the proviso to
- C cl. 1 was to read the guarantee agreement as a whole. The expression “together with such further sum for interest” in the proviso clearly indicates that the extent of the defendants’ liabilities were not limited to the sum of RM5,665,000 but should also include other sums comprising of interest on the
- D loan, commission or other charges named therein. Apart from that, cl. 4 stipulates that the guarantee was a continuing guarantee upon each of the guarantors. As a continuing guarantee, the liabilities of the guarantors were not confined to the principal sum alone but should include interest arising
- E from the loan plus other charges. This was further fortified by the provision in cl. 1 to the effect that “the guarantors shall for the purpose of the debt be deemed to be principal debtors”. As principal debtors, the defendants’ liability was not restricted to the sum of RM5,665,000 but for the whole sum
- F due and owing to the creditor by the principal debtor, *ie*, the borrower. (paras 34-36)
- (3) Clause 19 of the guarantees provides that the certificate of indebtedness was conclusive evidence as against the
- G defendants. In the circumstances, the certificate of indebtedness was binding and sufficient as proof of the amount due by the defendants (*Cempaka Finance Bhd v. Ho Lai Ying & Anor*; refd). It was thus not necessary for the court to answer the second question posed in this appeal.
- H (paras 37 & 38)

Bahasa Malaysia Translation Of Headnotes

- I Terdapat dua rayuan di sini yang berbangkit daripada guaman yang sama dan dengan persetujuan semua pihak, telah didengar bersama. Perayu (‘plaintif’), sebuah bank, telah memberi tiga kemudahan perbankan kepada Sri Tanjung Travel Sdn Bhd

(‘peminjam’) atas terma yang terkandung dalam dua surat tawaran berasingan. Kemudahan tersebut meliputi jaminan bank sebanyak RM100,000, pinjaman berkala sebanyak RM565,000 dan overdraf sebanyak RM3 juta. Responden-responden (‘defendan-defendan’) merupakan penjamin bagi kemudahan tersebut, tetapi hanya untuk jumlah RM5,665,000. Masalah timbul apabila peminjam gagal membuat bayaran balik bagi kemudahan perbankan tersebut. Dengan itu, plaintif telah memulakan tindakan guaman di Mahkamah Tinggi terhadap kesemua pihak yang terlibat dan menuntut, antara lain, (i) RM8,834,348.11 bagi kemudahan overdraf setakat 31 Januari 2006 (dengan faedah); dan (ii) RM207,752.01 bagi kemudahan pinjaman berkala setakat 31 Januari 2006 (dengan faedah). Memandangkan peminjam digulung berikutan suatu petisyen yang difailkan oleh pihak ketiga, maka perbicaraan diteruskan terhadap defendan-defendan kedua sehingga keempat sebagai penjamin. Adalah hujahan pihak defendan (a) bahawa liabiliti mereka terhad kepada jumlah RM5,665,000 berdasarkan proviso kl. 1 jaminan-jaminan; dan (b) bahawa notis tuntutan adalah cacat dan tidak sah memandangkan tuntutan yang dinyatakan adalah bagi jumlah RM9,059,767.17. Mahkamah Tinggi memberi penghakiman bagi pihak plaintif dan memutuskan bahawa kausa tindakan berbangkit terhadap defendan-defendan atas kegagalan untuk membayar tuntutan memandangkan terdapatnya tuntutan sah bagi bayaran yang dibuat. Tambahan, ia diputuskan bahawa sijil keterhutangan adalah mengikat dan merupakan bukti kukuh bagi jumlah terhutang. Atas rayuan, Mahkamah Rayuan mengakas keputusan Mahkamah Tinggi dan memutuskan bahawa walaupun jumlah sebenar tidak perlu dinyatakan dalam tuntutan yang dituju kepada penghutang utama, iaitu, peminjam, prinsip yang sama tidak terpakai bagi tuntutan terhadap penjamin di mana pemiutang perlu menyatakan jumlah sebenarnya. Berdasarkan itu, adalah diputuskan bahawa notis tuntutan adalah tidak sah dari sisi undang-undang. Mahkamah Rayuan juga memutuskan bahawa sijil keterhutangan tidak mengikat penjamin-penjamin kerana liabiliti mereka dikawal oleh proviso liabiliti maksimum dalam kl. 1 jaminan. Tidak puas hati, plaintif merayu ke mahkamah ini. Kebenaran merayu dibenarkan berdasarkan soalan-soalan berikut: (i) di mana jaminan perlu dibayar atas tuntutan, sama ada notis tuntutan yang dikeluarkan kepada penjamin mesti menyatakan jumlah sebenar yang dihutang oleh penjamin kepada pemiutang (‘soalan pertama’);

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- A dan (ii) jika jawapan kepada soalan pertama adalah dalam bentuk negatif, sama ada jumlah sebenar yang dihutang oleh penjamin boleh ditentukan semasa prosiding mahkamah dan penjamin bertanggungjawab untuk membayar jumlah yang dihakimi di bawah jaminan ('soalan kedua').
- B **Diputuskan (membenarkan rayuan dengan kos; mengeneipkan keputusan Mahkamah Rayuan)**
Oleh Arifin Zakaria KHN menyampaikan penghakiman mahkamah:
- C (1) Jaminan dalam kes ini adalah berdasarkan "on demand guarantee". Oleh itu, terdapat keperluan ketat bahawa tuntutan mesti dikeluarkan untuk memaklumkan penghutang bahawa pemiutang menuntut bayaran balik hutang tersebut. Fungsi tuntutan ini adalah untuk memberi notis kepada penghutang bahawa pemiutang menuntut bayaran balik jumlah yang dipinjam. Berbeza dengan dapatan Mahkamah Rayuan, adalah tidak mandatori untuk menyatakan jumlah sebenar yang terhutang kepada pemiutang dalam notis tuntutan. Dalam *Shell Marketing Co of Borneo Ltd v. Wee Boon Ping*, hakim tidak
- D dihalang daripada memberi penghakiman terus bagi plaintif walaupun jumlah yang dinyatakan dalam surat-surat tuntutan adalah lebih daripada jumlah yang akhirnya dituntut. Dengan itu, soalan pertama dijawab dalam bentuk negatif (*Co-operative Central Bank Ltd (In Receivership) v. Meng Kuang Properties Bhd*; dibezaikan).
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- G (2) Pendekatan yang diambil untuk mentafsirkan kl. 1 adalah untuk membaca perjanjian jaminan secara keseluruhannya. Kenyataan "together with such further sum for interest" dalam proviso jelas menunjukkan bahawa tahap liabiliti defendan-defendan adalah tidak terhad kepada jumlah RM5,665,000 tetapi melibatkan jumlah-jumlah lain seperti faedah atas pinjaman, komisyen atau bayaran-bayaran lain yang terkandung dalamnya. Selain daripada itu, kl. 4 memperuntukkan bahawa jaminan adalah jaminan berterusan terhadap setiap penjamin. Sebagai jaminan berterusan, liabiliti penjamin-penjamin tidaklah terhad kepada jumlah utama sahaja malah meliputi faedah yang berbangkit daripada pinjaman dan bayaran-bayaran lain. Maka, ia terbukti melalui peruntukan kl. 1 bahawa penjamin-penjamin
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merupakan penghutang utama bagi kehendak hutang tersebut. Sebagai penghutang utama, liabiliti defendan-defendan tidaklah terhad kepada jumlah RM5,665,000 tetapi bagi jumlah keseluruhan yang terhutang kepada pemiutang oleh penghutang utama, iaitu peminjam.

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- (3) Klausula 19 jaminan memperuntukkan bahawa sijil keterhutangan merupakan keterangan muktamad terhadap defendan-defendan. Dalam keadaan ini, sijil keterhutangan itu adalah mengikat dan mencukupi sebagai bukti bagi jumlah yang dihutang oleh defendan-defendan (*Cempaka Finance Bhd v. Ho Lai Ying & Anor*; dirujuk). Maka, tidak ada keperluan untuk menjawab soalan kedua dalam rayuan ini.

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Case(s) referred to:

Bache & Co (London) Ltd v. Banque Vernes et Commerciale De Paris SA [1973] 2 Lloyd's Rep 437 (**refd**)

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Bank of Baroda v. Panessar And Others [1987] Ch 335 (**refd**)

Bank Pembangunan (M) Bhd v. Limpo Sdn Bhd [1997] 1 LNS 435 HC (**refd**)

Bunbury Foods Pty Ltd and Another v. National Bank of Australasia Ltd And Another [1984] 51 ALR 609 (**refd**)

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Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC (**refd**)

Chung Khiaw Bank Malaysia Berhad v. Raju Jayaraman Kerpaya [1995] 1 LNS 51 HC (**refd**)

Co-operative Central Bank Ltd (In Receivership) v. Meng Kuang Properties Bhd [1991] 2 CLJ 1144; [1991] 2 CLJ (Rep) 467 HC (**dist**)

Nik Che Kok v. Public Bank Bhd [2001] 2 CLJ 157 CA (**refd**)

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O'Day v. Commercial Bank of Australia (1993) 50 CLR 200 (**refd**)

Public Bank Bhd v. Chan Siok Lie & Ors [1988] 1 LNS 179 HC (**refd**)

Shell Marketing Co of Borneo Ltd v. Wee Boon Ping [1990] 1 CLJ 564; [1990] 3 CLJ (Rep) 88 HC (**refd**)

Soon Peng Yam & Anor v. Bank Of Tokyo-Mitsubishi (Malaysia) Berhad [2003] 1 LNS 614 CA (**refd**)

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The Pacific Bank Bhd v. Chan Peng Leong [1998] 2 CLJ 440 CA (**refd**)

YM Orang Kaya Menteri Paduka Dato' Wan Ahmad Isa Shukri Wan Rashidi v. Kwong Yik Bank Bhd (2) [1989] 2 CLJ 1288; [1989] 1 CLJ (Rep) 187 SC (**dist**)

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(Civil Appeal No: 02-08-03(W))

For the appellant - John Wong Yok Hun (Chan Hwee Li with him);
M/s Azim Tunku Farik & Wong

For the respondents - Lim You Shyang; M/s Lim You Shyang & Co

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A *(Civil Appeal No: 02-09-03(W))*
For the appellant - John Wong Yok Hun (Chan Hwee Li with him);
M/s Azim Tunku Farik & Wong
For the respondents - Ahmad Moosdeen (Goh Keng Tat with him); M/s Chan
Moosdeem & Partners

B *[Appeal from Court of Appeal; Civil Appeal No: W-02-2791-2010 & W-02-*
2793-2010]

Reported by Kumitha Abd Majid

C

JUDGMENT

Arifin Zakaria CJ:

Introduction

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[1] This is an appeal against the decision of the Court of Appeal dated 4 December 2012 in allowing the respondents' appeal with costs. Leave to appeal was granted by this court on 11 March 2013 on the following questions:

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Question 1

Where a guarantee is made payable "on demand", whether a notice of demand issued to a surety there under:

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- (i) to be a valid and effective to crystallize that surety's liability to pay on the guarantee; and
- (ii) accordingly, to crystallize the "creditor's" cause of action against that surety;

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must state the precise amount due and owed by the surety to the creditor?

Question 2

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In the event the answer to question 1 above is in the negative and the notice of demand does not state the precise amount due and owed by a surety, "whether the precise amount due and payable by a surety can be subsequently adjudicated upon in court proceedings and the surety be made liable to pay the amount adjudicated to be due and owed under the guarantee?"

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In this judgment, the appellant will be referred to as plaintiff, and the respondents will be referred to as defendants as in the trial court.

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The Facts

[2] The facts relevant to this appeal are as follows: These two appeals, namely civil appeal No: 02(i)-8-03-2013(W) and civil appeal No: 02(f)-9-03-2013(W) (hereafter referred to as “the first and second appeal respectively”) arose out of the same suit, ie, High Court Kuala Lumpur Civil Suit No: D1-22-283-2006 and with agreement of parties were heard together.

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[3] The plaintiff, a bank, granted three banking facilities to Sri Tanjung Travel Sdn Bhd (first defendant in the High Court proceeding/ ‘the borrower’) upon terms as contained in two separate letters of offer dated 13 and 16 August 1996. The facilities comprised of a bank guarantee of RM100,000, a term loan of RM565,000 and an overdraft facility of RM3 million.

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[4] Subsequently, the second defendant gave a personal guarantee for a sum of RM500,000 through a letter dated 15 August 1996. At the same time, all defendants stood as guarantors *vide* two separate guarantees dated 9 April 1997 and 28 February 1998 for the sum of RM3,665,000 and RM2 million, respectively. The terms in both guarantees are similar. The fourth defendant also executed two separate charges in favour of the plaintiff in respect of properties held under HS(M)14851 No: PT 21339 and HS(M)14852 No: PT 21340 both in Mukim Kapar, Bukit Raja, Selangor as security for the banking facilities granted.

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[5] It should also be noted that the second defendant was at the material time a director of the borrower, while the third and fourth defendants were the shareholders of the borrower.

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[6] The borrower defaulted in repayment of the banking facilities. The plaintiff issued separate notices of demand dated 9 November 2005 to the borrower and the defendants. The borrower and the defendants failed to make any settlement.

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[7] For ease of reference, we reproduce below the relevant provisions of the guarantees:

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- A ... jointly and severally **guarantee payment on demand** upon us of all monies and liabilities ... **together with interest on all such debts and liabilities to the date of payment** ... Provided that the total sum recoverable from us hereunder is limited to the sum of [RM3,665,000.00 + RM2,000,000.00 = RM5,665,000.00]
- B owing or incurred to the Bank as aforesaid at the date of demand for the same is made by the Bank or discontinuance by any means of this guarantee by any of us ... (emphasis added)

Proceedings In The High Court

- C [8] The plaintiff commenced civil proceeding against all parties involved. The claims were for:

- (a) (i) RM8,834,348.11 for the Overdraft Facility as at 31 January 2006; and
- D (ii) interest to accrue at the rate of 3.0% per annum above the appellant's base lending rate (as at 31 January 2006 is at the rate of 6.25%) from 1 February 2006 until date of full and final settlement of the overdraft facility.
- E (b) (i) RM207,752.01 for the term loan facility as at 31 January 2006; and
- (ii) interest to accrue at the rate of 3.0% per annum above the appellant's base lending rate (as at 31 January 2006 is at the rate of 6.25%) from 1 February 2006 until date of
- F full and final settlement of the overdraft facility.

- [9] On 19 September 2007, the borrower was wound-up pursuant to a petition filed by a third party. Thus, the trial was proceeded against the second, third and fourth defendants
- G (guarantors) only.

[10] Four issues were raised before the High Court, namely:

- (a) whether the defendants' total maximum liability under the two guarantees is RM5,665,000 as at the date of demand;
- H (b) whether the demand is bad because the wrong amount was stipulated in the letter of demand;
- (c) whether separate letters of demand must be issued for each
- I guarantee; and
- (d) what is the amount outstanding.

[11] In dealing with the first issue, the High Court held that:

... What the Defendants have done is to fragment the reading and interpretation of clause 1. That is quite inappropriate as I have said earlier, the guarantee must be read as a whole and never piece-meal. In fact, the interpretation suggested by learned counsel for the Defendants would render the earlier parts of the clause of no effect. As it is, the imposition of “interest on all such debts and liabilities” is right up to the “date of payment”. If the maximum sum is only the sum arrived at or crystallized as at the date of the demand, then that provision for imposition of interest can never be realized. Such a reading of the guarantee is wrong and cannot be the understanding and sense in which the terms of clause 1 are used. Neither could it be the intention of the parties as express by the language used. Further, the proviso in clause 1 goes on to say that “the total sum recoverable ... is limited to the sum of [RM3,665,000.00 + RM2,000,000.00 = RM5,665,000.00] owing or incurred to the Bank as aforesaid at the date that demand for the same is made by the Bank ...together with such further sum for interest thereon ...” The deployment of the word “together” here does not mean and the parties cannot be taken to have intended it to mean inclusive”. Rather, that it means “in addition to” or “as well”. The reading suggested by the Defendants is also erroneous having regard to the fact that the object of the letter of demand is really to require the Defendants to keep to their part of the bargain. It is the failure to pay on such demand that the cause of action arises.

[12] In dealing with the second issue, the High Court held that there is no exceptional circumstances warranting precise stipulation of the sums due as at the date of the demand. Significantly, there is no evidence from any of the defendants that they had inquired on the precise amount due or even challenged the amount stipulated in the notice.

[13] With regard to the third issue, the High Court held that there is no requirement that a separate letter of demand must be issued for each guarantee.

[14] In dealing with the fourth issue, the High Court held that:

... Accordingly, I find that the Plaintiff’s claim is proved not only by the evidence of PW1 and the Defendants but also by the presence of the certificate of indebtedness tendered. This certificate is binding and sufficient proof of the amount due from the Defendants – see *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544.

- A [15] After a full trial the High Court allowed the plaintiff's claim against the second, third and fourth defendant as prayed in the amended statement of claim with costs.

Proceedings In The Court of Appeal

- B [16] The Court of Appeal in reversing the decision of the High Court held *inter alia* that the learned trial judge failed to apply the maximum liability provision in the two guarantees.

- C [17] In allowing the appeal, the Court of Appeal also held that:
- (a) the letter of demand must state the correct amount due to the plaintiff; and
- (b) with regard to conclusive evidence clause in cl. 15 of the two guarantees, the Court of Appeal held that it is applicable only to the borrower and not to the guarantors.
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The Issues Before This Court

- E [18] This court had on 11 March 2013 granted the plaintiff leave to appeal against the decision of the Court of Appeal dated 4 December 2012 on the two questions of law set out earlier.

- F [19] The principal issue before this court is whether the plaintiff's claim is limited to the sum of RM5,665,000 as stated in the proviso to cl. 1 of the guarantees. If the answer to the above issue is in the positive, the next issue is whether the plaintiff's notice of demand dated 9 November 2005 addressed to the defendants demanding the sum of RM9,059,767.17 is rendered invalid.

- G [20] Learned counsel for the plaintiff conceded that the cause of action in an "on demand" guarantee is crystallized or triggered by a valid and effective notice of demand. If the demand is invalid, then it is as good as no demand having been made and no cause of action could arise from such an invalid demand. On this point,
- H learned counsel relied on the case of *The Pacific Bank Bhd v. Chan Peng Leong* [1998] 2 CLJ 440.

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[21] Learned counsel for the plaintiff further submitted that it is settled law that guarantees are payable on demand. The purpose of the demand is merely to trigger the guarantor's obligation to pay on the same. However, there is no requirement that the demand must specifically mention the precise amount that is due and owing. In support, learned counsel referred us to the following authorities: *Nik Che Kok v. Public Bank Bhd* [2001] 2 CLJ 157; [2001] 2 MLJ 328; *Bank Pembangunan (M) Bhd v. Limpo Sdn Bhd* [1997] 1 LNS 435; [1998] 4 MLJ 433; and *Bank of Baroda v. Panessar And Others* [1987] Ch 335.

[22] The defendants' contention is that their liability is limited to the sum of RM5,665,000.00 only based on the proviso to cl. 1 of the guarantees. Since the demand was for RM9,059,767.17, far in excess of the amount due, the notice of demand is defective and invalid.

[23] The High Court disagreed with the defendants and held that the defendants' liabilities as guarantors arose when there was a valid or real demand for payment made on them, and on the failure to pay upon such demand, that the cause of action accrued. The High Court relied on the case of *Soon Peng Yam & Anor v. Bank Of Tokyo-Mitsubishi (Malaysia) Berhad* [2003] 1 LNS 614; [2004] 2 MLJ 31.

[24] The Court of Appeal in reversing the decision of the High Court held that although it may not be necessary to state the actual amount in the demand addressed to the principal debtor (the borrower), the same does not apply to a demand against a guarantor wherein the creditor is required to specify the exact amount. On that premise, the Court of Appeal held that the notice of demand in the present case was bad in law. In support, the Court of Appeal relied on the following authorities: *Bunbury Foods Pty Ltd and Another v. National Bank of Australasia Ltd And Another* [1984] 51 ALR 609, *Cooperative Central Bank Ltd (In Receivership) v. Meng Kuang Properties Bhd* [1991] 2 CLJ 1144; [1991] 2 CLJ (Rep) 467; [1991] 2 MLJ 283 and *YM Orang Kaya Menteri Paduka Dato' Wan Ahmad Isa Shukri Wan Rashidi v. Kwong Yik Bank Bhd (2)* [1989] 2 CLJ 1288; [1989] 1 CLJ (Rep) 187; [1989] 3 MLJ 155.

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- A [25] It is common ground that the guarantee in the present case is an on demand guarantee. As such there is stringent requirement that a demand must be issued notifying the debtor that the creditor is demanding repayment of the debt. However, contrary to the finding of the Court of Appeal, we are of the view that
- B there is no requirement for the notice of demand to state the precise amount due. This was the decision of the Court of Appeal in *Nik Che Kok v. Public Bank Bhd* [2001] 2 CLJ 157; [2001] 2 MLJ 328. (See also *Chung Khiaw Bank Malaysia Berhad v. Raju Jayaraman Kerpaya* [1995] 1 LNS 51; [1995] 3 AMR 2337 and
- C *Public Bank Bhd v. Chan Siok Lie & Ors* [1988] 1 LNS 179.) In *Nik Che Kok's* case, the Court of Appeal relied on the High Court of Australia in *O'Day v. Commercial Bank of Australia* (1993) 50 CLR 200 where it said:
- D Conceded that the first notice of demand did not specify the precise amount owing but there is no general rule that such a notice must specifically mention the precise amount owing. We are of the view that a demand is for the purpose of bringing home to the debtor that the creditor is demanding its money.
- E [26] Further support may be found in the case of *Chung Khiaw Bank Malaysia Berhad v. Raju Jayaraman Kerpaya* [1995] 1 LNS 51; [1995] 3 AMR 2337 where Abdul Hamid Hj Mohamed J (as he then was) referred with approval to the case of *Public Bank Bhd v Chan Siok Lie & Ors* [1988] 1 LNS 179; [1989] 2 MLJ
- F 305, where at p. 308 Shankar J (as he then was) observed:
- Nor is there any general rule that in all cases, unless the precise amount owing is correctly stated in a notice, the notice will be invalidated.
- G In the same case, Abdul Hamid Hj Mohamed J (as he then was) also cited with approval the case of *Shell Marketing Co of Borneo Ltd v. Wee Boon Ping* [1990] 1 CLJ 564; [1990] 3 CLJ (Rep) 88. In that case it was held that even though the amounts stated in the letters of demand were more than the amount finally claimed,
- H did not prevent the judge from giving summary judgment for the plaintiff.

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[27] In the present case, the Court of Appeal came to the opposite finding. In coming to its finding, the Court of Appeal relied heavily on *Bunbury Foods Pty Ltd and Another v. National Bank of Australasia Ltd And Another (supra)*, where the Australian High Court stated:

There is perhaps a stronger case for saying that, when a third party e.g. a guarantor, is called upon to pay the debt of another, the creditor should specify the amount. But in the circumstances of this case it is unnecessary to explore the problem further.

With respect, in our view, this statement is a *mere obiter*, as that was not the issue before the court. Perhaps it should be made clear that in *Bunbury Foods Pty Ltd (supra)*, the claim was against the borrower not against the guarantor. And in that case it was held that notice of demand is not invalid because it does not specify the sum owing and the plaintiff bank was held to be entitled to appoint the receiver and manager.

[28] Further, we found the following authorities referred to by the Court of Appeal namely, *Cooperative Central Bank Ltd (In Receivership) v. Meng Kuang Properties Bhd (supra)* and *YM Orang Kaya Menteri Paduka Dato' Wan Ahmad Isa Shukri Wan Rashidi v. Kwong Yik Bank Bhd (2) (supra)* are distinguishable from the present case. In *Cooperative Central Bank Ltd (In Receivership) v. Meng Kuang Properties Bhd (supra)*, it concerns with application for order for sale. It is trite law that an exact amount must be specified in such an application. While, in the case of *YM Orang Kaya Menteri Paduka Dato' Wan Ahmad Isa Shukri Wan Rashid v. Kwong Yik Bank Bhd (2) (supra)* the defendants were only served a carbon copy of the notice of demand. So, the court rightly held that there was no proper demand made against the guarantors.

[29] For the above reasons we hold that it is not mandatory for the notice of demand to state the exact amount due and payable to the creditor. The purpose of the demand is only to give notice to the debtor that the creditor is demanding repayment of the sum borrowed. Accordingly our answer to the first question is in the negative.

[30] We will now deal with the second issue.

- A [31] In this case the plaintiff's claim as per the statement of claim, and supported by the certificate of indebtedness and PW1's evidence, as at 31 January 2006 was for:
- (a) the sum of RM8,834,348.11 for the overdraft facility;
- B (b) the sum of RM207,752.01 for the term loan facility; and
- (c) interest at the rate of 3.0% per annum above the plaintiff's base lending rate from 1 February 2006 until date of full and final settlement for both facilities.
- C The amount claimed as at 23 August 2008 was for:
- (a) the sum of RM9,711,347.24 for the overdraft facility;
- (b) The sum of RM323,774.49 for the term loan facility; and
- D (c) interest at the rate of 3.0% per annum above the plaintiff's base lending rate from 23 August 2008 until date of full and final settlement for both facilities.
- E [32] Relying on *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544, the High Court, upheld the plaintiff's claim for the amount stated above. In that case it was held that the certificate of indebtedness was binding and sufficient proof of the amount due.
- F [33] The Court of Appeal in the present case held that the certificate of indebtedness is not binding on the guarantors on the ground that the guarantors' liabilities are governed by the maximum liability proviso in cl. 1 of the guarantees.
- G [34] In this regard, we agree with the learned High Court judge that the approach to be adopted in interpreting the proviso to cl. 1 is to read the guarantee agreement as a whole. The proviso cannot be read in isolation. Taking that approach, it becomes clear what was the intention of parties to the agreement. All the
- H three guarantees were similarly worded. Therefore, suffice for our purpose to consider one of the guarantees. Take the guarantee in pp. 45-48 in the appellant's core bundle. It opens with the words, "In consideration of you, EON BANK BERHAD ... making or continuing advances or otherwise giving credit or affording banking
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facilities and accommodation ... to SRI TANJUNG TRAVEL SDN BHD ...” the defendants “... jointly and severally guarantee payment on demand upon us of all monies and liabilities ... owing or incurred to the Bank from or by the customer ...” **A**

The proviso to cl. 1 reads: **B**

Provided that the total sum recoverable from us hereunder is limited to the sum of [RM3,665,000.00 + RM 2,000,000.00 = RM5,665,000.00] owing or incurred to the Bank as aforesaid at the date of demand for the same is made by the Bank or discontinuance by any means of this guarantee by any of us or by the executors administrators or legal representatives of any of us howsoever such sum is arrived at *together with such further sum for interest thereon and other commission banking charges and legal and other costs charges and expenses whether incurred in enforcing or seeking to enforce any security for or obtaining or seeking to obtain payment of all or any part of the money hereby guaranteed or otherwise howsoever as shall accrue due to the Bank within twelve months before or any time after the date of demand or discontinuance as aforesaid.* (emphasis added) **C**
D

[35] The expression “together with such further sum for interest ...” in the proviso clearly indicates that the extent of the defendants’ liabilities are not limited to the sum of RM5,665,000 but should also include other sums comprising of interest on the loan, commission or other charges named therein. **E**

[36] Apart from that, cl. 4 stipulates that the guarantee is a continuing guarantee upon each of the guarantors. As a continuing guarantee generally, the liabilities of the guarantors is not confined to the principal sum alone but should include interest arising from the loan plus other charges. This is further fortified by the provision in cl. 1 to the effect that “the guarantors shall for the purpose of the debt be deemed to be principal debtors”. As principal debtors the defendants’ liability is not restricted to sum of RM5,665,000 but for the whole sum due and owing to creditor by the principal debtor (the borrower). Considering the above provisions it is clear beyond doubt that the liabilities of the defendants could not be limited to the sum of RM5,665,000 as contended by the defendants. **F**
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- A [37] Clause 19 of the guarantees provides that the certificate of indebtedness is conclusive evidence as against the defendants. In the circumstances we hold that the certificate of indebtedness is binding and is sufficient as proof of the amount due by the defendants. (See *Cempaka Finance Bhd v. Ho Lai Ying & Anor* (supra); *Bache & Co (London) Ltd v. Banque Vernes et Commerciale De Paris SA* [1973] 2 Lloyd's Rep 437)
- B

[38] In view of our findings above, it is not necessary for us to answer the second question posed to us in this appeal.

- C [39] In the upshot the appeal is allowed with cost both here and in the courts below and the order of the Court of Appeal is accordingly set aside.

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